APPEAL NO. 023213
FILED FEBRUARY 13, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 10, 2002. Resolving the disputed issues before him, the hearing officer decided that the respondent's (claimant) date of maximum medical improvement (MMI) was October 19, 2000, with an impairment rating (IR) of 27%, in accordance with the designated doctor's report. The appellant (carrier) challenged the hearing officer's decision on sufficiency of the evidence grounds, and argued that the hearing officer abused his discretion in denying the carrier's request to add the issue of whether the Texas Workers' Compensation Commission (Commission) abused its discretion in appointing a second designated doctor. The carrier also complained that the hearing officer erred in requiring the carrier to show good cause for the addition of the issue; that the hearing officer erred in failing to address why the first designated doctor's report was not entitled to presumptive weight; and, that the hearing officer's decision and order had a typographical error in the number of weeks of impairment income benefits (IIBs) to be paid the claimant. There is no response in the file from the claimant.

DECISION

Affirmed, as corrected.

TIMELINE

We think its helpful in this case to restate the undisputed events leading up to the CCH. The claimant sustained a compensable, low back injury on _____. The Commission appointed a designated doctor, Dr. K, who examined the claimant on March 17, 1999, and assessed the claimant's MMI at that date, with a 0% IR, rationalizing that the claimant showed signs of symptom magnification and that the claimant could not document six consecutive months of pain. On May 8, 1999, the Commission wrote to Dr. K for clarification of his opinion, forwarding a letter from the claimant's treating doctor indicating that the claimant may require back surgery. On September 24, 2001, the claimant had spinal surgery related to the _____, compensable injury.[1] On December 19, 2001, the Commission wrote to Dr. K, forwarded the new medical information regarding the spinal surgery, and asked whether it was still his opinion that the claimant reached MMI March 17, 1999, with a 0% IR. On January 9, 2002, Dr. K responded that his MMI/IR certification applied only to the time of his examination and was accurate. Again, on May 30, 2002, the Commission wrote to Dr. K specifically asking if the spinal surgery changed his opinion on his certification of the claimant's MMI/IR. The Commission did not receive a response from Dr. K. On or about July 8, 2002, the Commission appointed Dr. W to be the second designated

[1] We note here that the record indicates that the claimant went through the spinal surgery process, and the carrier paid for the surgery.

doctor in this case. On July 18, 2002, Dr. W examined the claimant, and decided that the claimant reached MMI by operation of law on October 19, 2000 (*See* Section 401.011(30)(B)), and that he had a 27% IR.

The evidence presented at the CCH bore out more details. Dr. K testified that he did not receive the May 30, 2002, letter addressed to his previous office address because he was "long gone," as he had retired in April 2002. The benefit review officer (BRO) noted in her report that she had contact with Dr. K's office after the May 30, 2002, letter. Someone from Dr. K's former office called the BRO and told her that Dr. K had retired and would not be responding to her letter requesting clarification. After that correspondence, Dr. W was selected as the designated doctor.

We now address the issue of the typographical error as raised by the carrier and note that it is not the only typographical error requiring correction. In Finding of Fact No. 8, the hearing officer wrote that the first designated doctor, Dr. K, had last examined the claimant on "March 17, 2002," when it should have read "March 17, 1999." In addition, and as the carrier points out, in the Decision portion of the decision and order, the hearing officer wrote that the claimant was entitled to "91 weeks" of IIBs with his 27% IR, when it should have read "81 weeks" of IIBs. We hereby correct the hearing officer's decision and order to read as above.

Next, we consider the carrier's assertion that the hearing officer erred in denying its motion to add the issue of whether the Commission abused its discretion in appointing a second designated doctor. The carrier filed its motion to add the issue with the hearing officer with a pre-CCH expanded discovery motion. The carrier did not file a response to the benefit review conference (BRC) report. At the hearing, the carrier reurged the motion and the claimant objected to adding the issue. The carrier asserted that the issue had been briefly discussed at the BRC, though it did not explain its failure to respond to the BRC report. The hearing officer denied the motion because he found that there was not good cause to add the issue, and that it was a collateral matter such that, without addressing it, the hearing officer could resolve the certified issues of MMI and IR. Neither in its motion nor at the hearing did the carrier advance any good cause argument or evidence to add the issue, as is required under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7(e) (Rule 142.7(e)) when the parties do not agree to add the issue. As such, we cannot agree that the hearing officer erred in failing to add the issue.

The hearing officer did not err in concluding that the claimant's date of MMI was October 19, 2000, and that his IR was 27% in accordance with the report of the Commission-appointed designated doctor, Dr. W, whose opinion was entitled to presumptive weight. *See* Section 408.125(e). The hearing officer made a finding that Dr. W's opinion was not against the great weight of the other medical evidence, and that Dr. W's report was in compliance with the appropriate version of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association. Therefore, it appears from the

evidence that Dr. W was the designated doctor to whose report presumptive weight was to be given, as Dr. K indicated he could not or would not comply with the requests made by the Commission. *See* Rule 130.5. Thus, while the hearing officer does not specifically mention the rule, he does make findings supporting its application and we can affirm him on those grounds. *See* Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied).

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Based upon our review of the record, we find no error in the hearing officer's determination.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Terri Kay Oliver
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge